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Supreme Court, U.S.
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No. _____

In the

# Supreme Court of the United States

**CLAYTON HOSPITALITY GROUP, INC.,**
***Petitioner,***

***vs.***

**ORANGE COUNTY, FLORIDA and EARL K. WOOD,**
***Respondents.***

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

There is a serious split among the federal circuit courts as to the meaning of the phrase "prompt judicial review" in *Freedman v. Maryland*, 380 U.S. 51 (1965). Several circuits have held that the phrase means only the right to prompt access to the courts. Other circuits hold that the phrase means prompt access to the courts, followed by a speedy judicial resolution of the claim. The question presented by this Petition is:

> Does immediate access to the courts following a denial of a permit for constitutionally protected speech constitute prompt judicial review, as required by *Freedman v. Maryland*, without regard to the length of time allowed for a judicial decision?

## PARTIES TO THE PROCEEDING

The Petitioner is Clayton Hospitality Group, Inc., the Plaintiff in the District Court and the Appellant in the Eleventh Circuit. The Respondents are Orange County, Florida and its Tax Collector, Earl K. Wood, Defendants in the District Court and the Appellees in the Circuit Court.

All parties to the proceedings below are parties to this Petition.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Counsel for the Petitioners informs this Court that Clayton Hospitality Group, Inc. has no parent or subsidiary corporations, and no publicly owned company holds any ownership interest in the corporation.

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## OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit is reproduced at Appendix A to this Petition. The unreported opinion of the United States District Court for the Middle District of Florida is reproduced at Appendix B. The District Court's unreported opinion on rehearing is reproduced at Appendix C.

## JURISDICTION

The Court of Appeals entered its judgment and opinion on May 12, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Constitutional provisions

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech . . . .

### Statutory provisions

Orange County regulates adult entertainment businesses through a comprehensive licensing and regulatory ordinance. The provisions of that Ordinance that are pertinent to this Petition are reproduced as Appendix D.

## STATEMENT OF THE CASE

Like many cities and counties across the United States, Orange County, Florida has a broad zoning, licensing and regulatory ordinance applicable to adult entertainment businesses.[1] Included within the ordinance is a provision establishing the procedure for transfer of a license when a business is sold or otherwise acquired by a new operator. The transfer provision requires the new operator to apply to the Orange County Tax Collector. The Tax Collector distributes copies of the application to the Sheriff and to the County's zoning, building, health and fire departments. The Sheriff and the various departments do background checks, examine the zoning for the business and conduct building and records inspections. After those are completed, the Sheriff and each department makes a recommendation to the Tax Collector as to whether the transfer should be approved.

The Code gives the responsibility for making the ultimate decision on whether to approve the transfer to the Tax Collector. In practice, however, the Tax Collector simply "rubber-stamps" the recommendation of each department.[2] The decision of the Tax Collector must be made within 30 days after receiving the application, and the applicant must be notified within 7 days of that

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1 The regulatory ordinance is cited as the Orange County Adult Entertainment Code, and is codified as Chapter 3 of the Orange County Code of Ordinances. The Adult Entertainment Code will be referred to as "the Code" throughout this Petition.

2 In a pre-trial deposition, the manager of the Occupational License Department of the County, the office that issues and transfers licenses, verified that whatever the departments recommend is what her office does, without exception.

decision. If the Tax Collector denies the application, the applicant has 30 days to file a petition for review in the circuit court of Orange County.[3] There is no time limit within which the circuit court must render a decision.[4]

Clayton Hospitality Group, Inc. purchased an adult entertainment business and applied for a license transfer. Citing building violations that Clayton vigorously disputed, the Tax Collector denied the application. In response, Clayton (1) corrected the "deficiencies," (2) re-applied for a transfer, and (3) filed this lawsuit, arguing that the transfer portion of the Code was facially unconstitutional because, *inter alia*, it did not provide prompt judicial review of the denial of the transfer application.[5] Clayton relied on this Court's opinions in *Freedman v. Maryland*, 380 U.S. 51 (1965) and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

The parties filed cross-motions for summary judgment. On July 30, 2002 the District Court granted the motion filed by the County and the Tax Collector, denied Clayton's motion, and dismissed the case.[6] Following *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir.

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3 Florida's circuit courts are trial courts of general jurisdiction, and are the courts that review final decisions of administrative agencies.

4 Clearly, the Code provides prompt access to the courts if a transfer application is denied. It does not provide for prompt judicial review. The Code would be unconstitutional in at least four federal circuits, but it is valid in at least four others, including the Eleventh Circuit.

5 Once the federal lawsuit was filed, the Tax Collector granted the license transfer. This is an established pattern with adult entertainment license transfer applications in the County.

6 Appendix B.

1999), *cert. denied*, 529 U.S. 1020 (2000), the District Court expressly held that the Code provided for prompt judicial review of transfer denials because it allowed an unsuccessful applicant immediate *access* to the courts.

Clayton appealed to the United States Court of Appeals for the Eleventh Circuit, arguing that the transfer procedure lacked any provision for prompt judicial review. As it had done in the District Court, Clayton acknowledged that the panel would be bound by the prior decision in *Boss Capital*, and that the issue had once again been presented in order to preserve it for further review.[7]

On May 12, 2003 the Court of Appeals rendered its decision. The panel held that prompt access to the courts is sufficient to comply with *Freedman*. The panel simply relied on the earlier panel opinion in *Boss Capital*.

## REASON FOR GRANTING THE WRIT

This case brings a vexing problem back to the Court. At this point in time, the federal circuits appear to be evenly divided on the issue Clayton brings to this Court. On two previous occasions the Court has tried to resolve the continuing, and growing, conflict among the circuits on what constitutes prompt judicial review.[8] It is of significant constitutional importance that this conflict

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7 This was acknowledged by the Eleventh Circuit panel in fn. 3 of its opinion. App. A, at 9a.

8 The two earlier cases were *City News & Novelty, Inc. v. City of Waukesha*, 121 U.S. 743 (2001) and *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). Since the Court's last attempt in *Thomas*, the Tenth Circuit has ruled on the issue. The circuits now appear to be evenly divided.

be finally resolved, so free speech receives the same protection in one circuit as in another.[9]

This case also gives the Court the opportunity to reaffirm its decision in *FW/PBS* that prompt judicial *review*, not mere access to the courts, is what this Court meant in *Freedman*.

**The Eleventh Circuit opinion is in direct conflict with decisions of other circuit courts on the requirement of prompt judicial review mandated by *Freedman v. Maryland*.**

Of prime importance to this Court, in meeting its constitutional obligation to the lower courts, is the need to resolve a serious conflict among the circuits on an issue of significant importance: the requirement that a prior restraint of speech provide for prompt judicial review. The circuits are divided as to what "prompt judicial review" means. In addition to the two earlier attempts by the Court to resolve the conflict, another request for resolution is now pending before the Court: *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, Docket No. 02-1609. This case, and *City of Littleton*, present the Court with a perfect opportunity to finally resolve the conflict.

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9 An adult nightclub in Oklahoma (Tenth Circuit) has the right to prompt judicial disposition. Another nightclub, a few miles over the border in Texas (Fifth Circuit), can only count on prompt judicial access. The same is true for a nightclub in Tennessee (Sixth Circuit) and one in adjoining Georgia (Eleventh Circuit). Federal constitutional rights should not depend on state borders.

In 1965, this Court decided *Freedman v. Maryland*, 380 U.S. 51 (1965). The case involved a statute that required movie exhibitors to submit every film to a review board to obtain a license for showing the film in the state. The Court held that whenever the government imposes a prior restraint on free speech through a permit scheme, that scheme must contain three procedural safeguards. One of those safeguards requires prompt judicial review if a license is denied. 380 U.S. at 59. *See also, FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990) (" . . . there must be the possibility of prompt judicial review in the event that the license is erroneously denied . . . ."). In its opinion in *Freedman* the Court made it clear that "prompt judicial review" meant more than access to the courts:

> . . . Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. *See Bantam Books, Inc. v. Sullivan, supra*. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.
>
> *Id.*

Prompt judicial review, as clearly defined in *Freedman*, is no longer required in the First, Fifth, Seventh and Eleventh Circuits. *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Auth.*, 984 F.2d 1319 (1st Cir. 1993); *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (*en banc*), *cert. denied*, 511 U.S. 1085 (1994); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000). It remains a mandatory part of the *Freedman* test in four other circuits. *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995)(en banc), *cert. denied*, 516 U.S. 1010 (1995); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.1995); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998); and *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 311 F.3d 1220 (10th Cir. 2002).

The Court can now resolve the issue. In this case, the District Court, relying exclusively on *Boss Capital*, said that prompt judicial review only meant prompt access to the courts once a permit was denied.[10] The 3-judge panel in the Eleventh Circuit – again bound by the panel decision in *Boss Capital, supra*, said the same.[11]

That puts this case squarely in conflict with the decisions in *11126 Baltimore Boulevard, East Brooks Books, Baby Tam* and *Z.J. Gifts*.

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10 App. B at 19a-20a.

11 App. A at 9a.

## CONCLUSION

This Court has twice before attempted to resolve the conflict among the circuits as to what is meant by *Freedman*'s requirement of prompt judicial review. It is time the conflict is settled.

Clayton Hospitality Group, Inc. asks this Court to grant this Petition so the Court can finally settle this matter. In the event the Court grants the Petition in *Z.J. Gifts*, Clayton asks the Court to either consolidate this case with *Z.J. Gifts* or to hold this case in abeyance until *Z.J. Gifts* is decided.

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[DO NOT PUBLISH]

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 02-14738

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D.C. Docket No. 01-01271-CV-ORL-19

**CLAYTON HOSPITALITY GROUP, INC., a Florida corporation,**

**Plaintiff-Appellant,**

**versus**

**ORANGE COUNTY, a political subdivision of the State of Florida, EARL K. WOOD, in his official capacity as Orange County Tax Collector,**

**Defendants-Appellees.**

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Appeal from the United States District Court for the Middle District of Florida

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(May 12, 2003)

Before MARCUS, WILSON, Circuit Judges, and RESTANI*, Judge.

PER CURIAM:

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*Honorable Jane A. Restani, Judge, United States Court of international Trade, sitting by designation.

Plaintiff-Appellant Clayton Hospitality Group, Inc. ("Clayton") appeals the district court's order granting summary judgment to Orange County, Florida and Earl K. Wood, as Orange County Tax Collector ("Defendants") in Clayton's amended complaint, filed pursuant to 42U.S.C. § 1983. In its amended complaint, Clayton raised a facial challenge to the constitutional validity of the license-transfer provisions contained in Orange County's Adult Entertainment Code ("AEC"). Clayton contends that the license-transfer provisions are a prior restraint on free expression that give public officials "unbridled" discretion and that do not include the procedural safeguards mandated in *Freedman v. Maryland*, 85 S.Ct. 734,737-39 (1965). No reversible error has been shown; we affirm.

Gerald Uranick, as President of Clayton, purchased from InnCon American, Inc. ("InnCon"), the adult entertainment license, and the trade name for the adult entertainment business known as "Diamond Club" in Orange County, Florida. Uranick, on behalf of Clayton, then filed an application with the Occupational License Department of the Orange County Tax Collector for a transfer of the adult entertainment license from InnCon to Clayton. Defendants denied Clayton's first transfer application but granted Clayton's second application as a result of Clayton correctng various building-code violations.

After Clayton's first transfer application was denied but before its second transfer application was approved, Clayton filed a complaint raising both facial and "as applied" constitutional challenges. Clayton amended his complaint following Defendants' approval of his second application, thereby deleting his "as applied" challenge. Clayton sought, among other things, a judgment declaring

the transfer provisions – requiring a building inspection – unconstitutional and an injunction permanently enjoining Defendants from enforcing these provisions. Both parties conducted discovery and filed motions for summary judgment, pursuant to Fed.RCiv.P. 56(c). The district court, finding that the contested license-transfer provisions were constitutional on their face, granted Defendants' motion for summary judgment and denied Clayton's motion.

As a preliminary matter, we must determine whether we have jurisdiction to review Clayton's constitutional challenge. See *Morrison v. Allstate Indem. Co.*, 228 F. 3d 1255, 1261(11th Cir. 2000) (federal courts have an obligation to inquire into jurisdiction whenever it may be lacking). As discussed above, Defendants granted Clayton's second application for a license after Clayton corrected various building-code violations. But when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or to deny expressive activity, a person who is subject to the law may challenge it facially without first applying for, and being denied, a license. *City of Lakewood v. Plain Dealer Publ'g Co.*, 108 S.Ct. 2138, 2143 (1988).

We review a summary judgment ruling *de novo*, applying the same legal standards used by the district court. *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1242 (11th Cir. 2001). The constitutionality of a statute is a question of law subject to *de novo* review. *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1277 (11th Cir. 2001). Although a person raising a facial challenge to a statute generally must establish that no set of circumstances exists upon which the .application of the statute would be valid, we permit facial challenges to prior

restraints on speech without requiring the plaintiff to make such a showing. *United States v. Frandsen*, 212 F.3d 1231, 1235-37 (11th Cir. 2000).

A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs. *Ward v. Rock Against Racism*, 109 S.Ct. 2746, 2756 n.5 (1989). Prior restraints are not unconstitutional *per se*. *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596, 604 (1990). But a system of prior restraint "comes to this Court bearing a heavy presumption against its constitutional validity." *Id.*

As a form of prior restraint, licensing schemes commonly contain two defects: discretion and the opportunity for delay. *Lady J. Lingerie. Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1554(2000). Statutes, as such, may not give public officials "unbridled" discretion to deny persons permission to engage in constitutionally protected expression. *Id.* at 1362. And a licensing ordinance must contain, at a minimum, the latter two procedural safeguards from *Freedman*, that is, specified brief time limits on the decisionmaker and prompt judicial review. *Redner v. Dean*, 29 F.3d 1495, 1500 (11th Cir. 1994) (citing to the plurality in *FW/ PBS*, 110 S.Ct. at 606-07, 611).

The license ordinance at issue here, the AEC, licenses and regulates adult entertainment businesses in

Orange County, Florida.[1] Section 3-26 of the AEC provides that no adult entertainment establishment may operate without having first been granted an adult entertainment license by the Tax Collector. *See* AEC § 3-26. Section 3-33 of the AEC allows for the transfer of an existing adult entertainment license for an existing adult entertainment establishment. *See generally*, AEC § 3-33. Upon receipt of a properly filed transfer application, the Tax Collector must "immediately . . . send photocopies of the application to the sheriff, the building department, the fire rescue services division, the health department, and the zoning department." *See* AEC § 3-28(a). Each of these departments then must "promptly conduct an investigation of the applicant, application and the proposed establishment in accordance with its responsibilities summarized in section 3-9 of this chapter." *See* AEC § 3-28(b); *see also* AEC § 3-9(2) – (6) (summarizing the inspection duties of the departments listed in § 3-28).

The AEC further provides that each department, after completing its investigation, must prepare and forward to the Tax Collector a report stating whether the department found a violation of the applicable statutes, codes, or ordinances. *See* AEC § 3-28(c). The Tax Collector must grant or deny an application, dependent

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[1] As the district court noted, neither party disputes that the adult entertainment regulated by the AEC constitutes expression protected under the First Amendment. Defendants do challenge whether the AEC license-transfer provisions constitute a prior restraint because these provisions do not prevent a new owner or operator who has applied for a license transfer from managing the adult entertainment establishment before the transfer is approved. We will assume for purposes of this appeal, however, that these provisions constitute a prior restraint.

upon the department recommendations, within 30 days from the date of its proper filing and must notify the applicant within 7 days of the decision. *See* AEC § 3-29(a)( 1). If none of the departments has made a finding within 30 days that would require denial of the license transfer, the Tax Collector must grant the application. *See* AEC § 3-29(b). If the application is denied, an applicant may submit another application upon payment of the required fee. *See* AEC § 3-19(d). And the Tax Collector's decisions "may be immediately reviewed as a matter of right by a court of competent jurisdiction upon the filing of an appropriate pleading by an aggrieved party." *See* AEC § 3-10.

Clayton first contends that the license-transfer provisions in the AEC constitute an unconstitutional prior restraint because they give Defendants "unbridled" discretion to deny transfers. Citing to *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666 (11th Cir. 1984), Clayton asserts that, similar to the unconstitutional provisions in *Miami Herald*, the licensing provisions here improperly grant inspectors the discretion to determine which codes, statutes, ordinances, and regulations to apply in deciding whether the building is "in compliance." Clayton also argues that, by conducting inspections separate from the licensing process, Defendants still could accomplish their goals of protecting the public health and safety without infringing on the First Amendment rights of transfer applicants.

Statutes may not give public officials "unbridled" discretion to deny persons permission to engage in constitutionally protected expression. *City of Lakewood*, 108 S.Ct. at 2144. We have interpreted this principle as implying that some measure of discretion is acceptable,

but that standards must be precise and objective, with amounts of discretion beyond the "mere ministerial" suspect. *Lady J. Lingerie*, 176 F.3d at 1362. Applying these principles, we determined that the ordinance in Miami Herald – allowing the city commission to deny a license if it found any violation of any provision of the entire city code – gave city officials too much discretion and was, as such, facially unconstitutional. *Miami Herald*, 734 F.2d at 674–75; *see also Lady J. Lingerie*, 176 F.3d at 1362 (ordinance impermissibly set out general criteria that were neither precise nor objective).

On the other hand, the AEC's license-transfer provisions do not give officials "unbridled" discretion in recommending whether or not the Tax Collector should grant or deny an application. The AEC specifies which provisions of the Orange County Code are applicable by directing that applicable administration departments must inspect for violations of building, zoning, fire, and health ordinances or codes. *See* AEC § 3-9. Unlike the ordinance in *Miami Herald*, the licensing provisions in the AEC dictate that each administrative department charged with the responsibility of enforcing specific codes, rather than a voting or political body such as a county commission, must make the decision.[2] The standards set out in the AEC for transferring licenses, as such, are ministerial and do not impermissibly give each applicable administrative department "unbridled" discretion. *Lady J. Lingerie*, 176 F.3d at 1362.

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[2] *Miami Herald* also is distinguishable because, as discussed below, the AEC prescribes a reasonably brief time within which the Tax Collector must decide whether to grant or deny a transfer application and furnishes access to prompt judicial review. Cf. *Miami Herald*, 734 F.2d at 675-76 (ordinance provided neither time limits for license decisions nor means for prompt judicial review).

In addition to challenging the amount of discretion contained in the AEC's license-transfer provisions, Clayton challenges the amount of time Defendants are allowed in deciding whether to grant or deny transfers. Clayton concedes that § 3-29 appears to require final action on a transfer application within 30 days, but contends that this time limit is illusory in practice because Defendants may continue denying a person's applications by finding a different minor violation each time an application is filed. In a facial constitutional challenge, however, we are to analyze a statute as it is written; the facts of the challenging party's case are not critical. *See Miami Herald*, 734 F.2d at 674 n.4.

As written, if none of the applicable departments have made a finding that an application should be denied, the Tax Collector must grant the license transfer within 30 days of receipt. *See* AEC § 3-29(b). The AEC, as such, requires the Tax Collector to act within 30 days from the date the application is filed, regardless of whether the applicable departments have conducted their respective inspections. And we have determined that this 30-day time limit provides a satisfactory procedural safeguard as required by *Freedman*. *See Redner*, 29 F.3d at 1500 (45-day time limit reasonable).

Because the license-transfer provisions in the AEC neither give government officials "unbridled" discretion to deny applicants permission to engage in constitutionally protected expression nor deny applicants the procedural safeguards guaranteed in *Freedman*, the district court did not err in granting Defendants' motion for summary

judgment.[3]

AFFIRMED.

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[3] Clayton also argues for purposes of preserving the record, that the license-transfer provisions in the AEC are unconstitutional because they do not require courts to grant prompt judicial review. Defendants respond that, despite that the record excerpts contain a document labeled "First Amended Complaint," which includes this argument, the record only contains a document entitled "Amended Complaint," in which Clayton abandoned this argument A review of the record has not revealed a document labeled "First Amended Complaint." Nevertheless, we have determined that "access to prompt judicial review [as opposed to prompt judicial resolution] is sufficient for adult entertainment licensing ordinances." *See Boss Capital, Inc. v. City of Casselberry*. 187 F.3d 1251, 1256-57 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000).

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

**Case No. 6:01-CV-1271-ORL-19 JGG**

**CLAYTON HOSPITALITY GROUP, INC.,**

**Plaintiff,**

**v.**

**ORANGE COUNTY, a political subdivision of the State of Florida and EARL K. WOOD, in his official capacity as Orange County Tax Collector,**

**Defendants.**

_____/

**ORDER**

This case is before the Court on the following matters:

1) Plaintiff Clayton Hospitality Group, Inc.'s Motion for Summary Judgment (Doc. No. 28) and Defendants Orange County and Earl K. Wood's Response to Plaintiff Clayton Hospitality Group, Inc's Motion for Summary Judgment (Doc. No. 36).

2) Defendants Orange County and Earl K. Wood's Motion for Final Summary Judgment and Memorandum in Support Thereof (Doc. Nos. 40 & 41) and Plaintiff Clayton Hospitality Group, Inc.'s Response In Opposition

to Defendants Orange County and Earl K. Wood's Motion for Final Summary Judgment (Doc. No. 45).

Plaintiff Clayton Hospitality Group, Inc. ("Clayton") brings suit against Defendants Orange County and Earl K. Wood (collectively "County") under 42 U.S.C. § 1983. The suit is a facial challenge to the procedure in the County's Adult Entertainment Code ("AEC") whereby an adult entertainment license is transferred by the County following a change in ownership of an adult entertainment establishment.

Clayton maintains that the AEC's transfer provision is facially unconstitutional under the First Amendment to the United States Constitution. Clayton seeks a judgment declaring a specific portion of the transfer provision unconstitutional and an injunction permanently enjoining the County from enforcing the provision. Both parties have moved for summary judgment and have submitted depositions and notices of filing in support of their respective positions. *See* (Doc. Nos. 30-33, 37-39).

**BACKGROUND**

Clayton is the operator of an adult entertainment establishment located at 527 North Semoran Boulevard, Orlando, Florida. *See* (Doc. No. 28). The business operates under the name of "The Diamond Club." *Id.*

Clayton purchased the adult entertainment license and trade name for the Diamond Club from InnCon America, Inc. on July 25, 2001. *See* (Doc. No. 32). Gerald Uranick, President of Clayton, assumed control of the business on the day of purchase and took physical possession of the property on August 1, 2001. *See id.* Mr.

Uranick performed some maintenance and cleanup on the property. *See id.*

On August 7, 2001, Mr. Uranick filed an application with the Occupational License Department of the Orange County Tax Collector for a transfer of the adult entertainment license for the Diamond Club from InnCon America, Inc. to Clayton. *See* (Doc. No. 38, Exh. A). As part of this application, Mr. Uranick submitted documentation showing that Clayton had purchased InnCon's entertainment license for the Diamond Club, that the landlord of the property at 527 North Semoran Blvd. and InnCon had executed a mutual termination of lease and that Clayton and the landlord of the property had entered into a lease. *See id.*

Section 3-26 of Orange County's AEC provides that no adult entertainment establishment can operate without having been granted an adult entertainment license by the. Tax Collector. *See* (Doc. No. 33).[1] The AEC also provides that anyone who acquires an already-licensed adult entertainment business can obtain a transfer of the license by applying to the Tax Collector for a transfer. *See* (AEC § 3-33). An applicant must file a transfer application pursuant to § 3-27. The application is then investigated pursuant to § 3-28 and is granted or denied by the Tax Collector under § 3-29. *See* (AEC § 3-33).

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[1] A copy of Orange County's Adult Entertainment Code is contained in Document Number 33, which is Exhibit A of Clayton's Motion for Summary Judgment. All future references to the Adult Entertainment Code will be cited as "AEC" followed by the appropriate section number.

Section 3-28(a) provides that "upon receipt of an application properly filed . . ., the tax collector shall immediately . . . send photocopies of the application to the sheriff, the building department, the fire rescue services division, the health department and the zoning department. *See* (AEC § 3-28). According to § 3-28(b):

> [e]ach department shall promptly conduct an investigation of the applicant, application and the proposed establishment in accordance with its responsibilities summarized at section 3-9 of this chapter.[2]

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[2] Under § 3-9, each department has the following responsibilities:

> The sheriff is responsible for verifying information contained on an application pursuant to section 3-27(b) (1) through (5), for inspecting any proposed, licensed or nonlicensed establishment in order to ascertain whether it is in compliance with applicable criminal statutes and ordinances, including those set forth at article V of this chapter, for determining whether any applicant for a license has been convicted of a felony or specified criminal act within the previous five (5) years, and for enforcing applicable criminal statutes and ordinances, including those set forth at article V of this chapter.
>
> The building department is responsible for inspecting any proposed or existing establishment in order to ascertain whether it complies with or is complying with Article IV of this chapter and applicable building codes, statutes, ordinances, and regulations.
>
> The fire and rescue services division is responsible for inspecting any proposed or existing establishment in order to ascertain whether it complies with or is complying with article IV of this chapter and all applicable fire codes, statutes,

(continued...)

(AEC § 3—28 (b)).

After its investigation each department must prepare and forward to the Tax Collector a report stating whether the department found a violation of the applicable building, fire, health or zoning codes. (AEC § 3-28(c)). The Tax Collector must grant or deny an application wi hin thirty (30) days from the date of its proper filing and must notify the applicant within seven days of the decision. (AEC § 3-29(a)(1)). If none of the departments have made a finding within thirty days that would require denial of the license or transfer, the Tax Collector must grant the application. (AEC § 3-29(b)). Additionally, any decision of the Tax Collector "may be immediately reviewed as a matter of right by a court of competent jurisdiction upon the filing of an appropriate pleading by an aggrieved party." (AEC § 3-10).

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[2](...continued)
ordinances, and regulations.

The health department is responsible for inspecting any proposed or existing establishment in order to ascertain whether it complies with or is complying with article IV of this chapter and all applicable health codes, statutes, ordinances, and regulations.

The zoning department is responsible for ascertaining whether any proposed or existing establishment complies with all locational requirements of this chapter, applicable portions of articles III and IV of this chapter, all applicable zoning regulations, and whether a licensed establishment is complying with article IV of this chapter and all applicable zoning regulations and land use laws.

(AEC § 3—9(2)—(6))

Upon receiving Clayton's application for a transfer, the Tax Collector forwarded copies of it to the appropriate departments. On August 22, 2001, building division inspectors conducted an inspection of the property and found several violations of the applicable building codes. *See* (Doc. No. 38, Exh. E). The inspector notified Mr. Uranick of the violations which included faulty stairway construction and exterior lighting violations. *See* (Doc. No. 38, Exh. F). By letter dated September 6, 2001, the Tax Collector denied Clayton's application for a transfer because of the building violations. *See* (Doc. No. 38, Exh. G).

On or about October 30, 2001, Clayton filed its original Complaint in the instant action against Orange County. *See* (Doc. No. 1). Clayton alleged that the portion of the AEC that requires a building inspection for the Tax Collector to transfer a license is facially unconstitutional.

Clayton also filed on October 30, 2001, a second application for a transfer of the existing adult entertainment license for the Diamond Club. *See* (Doc. No. 38, Exh. J). Once again, the Tax Collector forwarded copies of the application to the appropriate departments. The building division inspectors performed an inspection and again found building violations. *See* (Doc. No. 38, Exh. K). Specifically, the violations involved the use of exterior lighting that was not marked "suitable for wet locations" and the construction of a raised floor area that was apparently done without a permit.

However, after the building inspection Clayton corrected all of the listed violations. On November 21, 2001, the building division notified the Tax Collector that

the building division would approve the application for transfer as the violations were corrected. *See* (Doc. No. 38, Exh. L). Accordingly, on November 28, 2001, the Tax Collector approved the transfer of InnCon's adult entertainment license to Clayton. *See* (Doc. No. 38, Exh. H).

Despite the fact Clayton ultimately received the transfer of the adult entertainment license, Clayton filed an Amended Complaint on January 4, 2002. *See* (Doc. No. 24). Clayton seeks a declaratory judgment that the transfer provision of the AEC facially violates the First Amendment and a permanent injunction prohibiting the County from enforcing it.[3] *See id.* Additionally, Clayton adds a count for money damages seeking reimbursement of its two-hundred dollar ($200) application fee which it paid to the County upon filing the second transfer application. Clayton maintains that if the transfer provision is facially invalid, it is entitled to recover the money it spent to reapply for the transfer. *See id.*

Both parties have moved for summary judgment and agree that the facts of the case are undisputed and that summary judgment is appropriate. The County argues that Clayton's claims are not justiciable as he has already received the license and has no definite intent to transfer a license in the future. Additionally, the County asserts that the AEC is facially constitutional.

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[3] Clayton also asserted a claim that the transfer provision violates the Fourteenth Amendment, but Clayton has withdrawn that argument. *See* (Doc. No. 47).

**LEGAL STANDARD:**

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." *Id.* The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986)

In determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255. The court may not weigh conflicting evidence or weigh the credibility of the parties. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 919 (11th Cir. 1993) (citation omitted). If a reasonable fact finder could draw more than one inference from the facts, and that inference creates an issue of material fact, then a court must not grant summary judgment. *Id.* (citation omitted).

**ANALYSIS:**

**1) Justiciability of Clayton's Claims:**

The County initially argues that Clayton's claims are not justiciable because they are moot and not ripe.

The County further argues that Clayton lacks standing to assert the claims. Specifically, the County claims that because Clayton has already received the license for which it applied, there is no "live controversy" as to which this Court may rule.

However, Clayton's Amended Complaint contains only a facial challenge to the AEC provisions. *See* (Doc. No. 24). Clayton's claim that the AEC is unconstitutional as applied by the County was withdrawn in the Amended Complaint. Clayton's remaining facial challenge to the AEC is a justiciable claim despite the fact Clayton received its license.

The United States Supreme Court has recognized the right of a plaintiff to facially challenge a licensing statute without first applying for a license. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755 (1988). It is well established that "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *Lakewood*, 468 U.S. at 755.

Clayton argues that the transfer provisions of the AEC grant County officials unbridled discretion in granting or denying a transfer application. Such allegations are sufficient to support a facial challenge of the ordinance.

**2) Constitutionality of the Adult Entertainment Code:**

This case deals with the constitutionality of a licensing scheme that regulates First Amendment protected businesses.[4] The United States Supreme Court has found that a licensing scheme that extends to city officials the discretion to deny permits constitutes a prior restraint "that avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). In the case of a licensing requirement for the operation of adult entertainment businesses, two such procedural safeguards are required. *FW\PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990).

First, the licensor must be required to make the decision whether to issue the license within a specified, brief period of time. *See Freedman*, 380 U.S. at 58-59. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing protected speech. *See City of Dallas*, 493 U.S. at 227. Second, license applicants must be guaranteed prompt judicial review in the event the license is erroneously denied. *See id.* at 228.

Clayton asserts that the AEC provision at issue fails both requirements of a specific time frame and prompt judicial review. However, Clayton concedes that his argument that the ordinance fails to provide prompt

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[4] There is no dispute that the nude dancing that occurs in Diamond Club constitutes expression protected under the First Amendment. *See Redner v. Dean*, 29 F.3d 1495, 1499 (11th Cir. 1994)

judicial review is not supported by the Eleventh Circuit Court of Appeals' decision in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999). In *Boss Capital* the Eleventh Circuit Court of Appeals found that access to prompt judicial *review*, as opposed to judicial *resolution*, is sufficient for adult entertainment licensing ordinances. *See Boss Capital*, 187 F.3d at 1256-57. The Court agrees that under *Boss Capital*, the AEC sufficiently provides for prompt judicial review of the Tax Collector's decision. *See* (AEC § 3-10). Clayton concedes this as well, but makes his argument for the purpose of preserving it for appeal.

Clayton next maintains that the transfer provision of the AEC gives County officials unbridled discretion to deny a transfer and that the discretion is not adequately restrained by the two procedural safeguards.

Clayton relies solely on the Eleventh Circuit Court of Appeals opinion in *Miami Herald Publ. Co. v. City of Hallendale*, 734 F.2d 666 (11th Cir. 1984), for its argument that the AEC gives officials unbridled discretion. In *Miami Herald*, the Eleventh Circuit reviewed a city ordinance that created a licensing requirement for the operation of any business in the city of Hallendale, Florida. *See Miami Herald*, 734 F.2d at 669. The ordinance provided that a license could not be issued if the city commission found that a business did not comply with "applicable ordinances or regulations." *Id.*

The Miami Herald, a newspaper publishing company, challenged the licensing requirement, claiming the ordinance was facially unconstitutional. *See id.* The Miami Herald claimed that the ordinance granted uncontrolled discretion to city officials in deciding

whether to grant licenses and therefore provided the officials the opportunity to discriminatorily deny licenses. *See id.* at 674.

The Eleventh Circuit Court of Appeals affirmed the district court finding that the ordinance was facially unconstitutional. Specifically, the ordinance allowed a license to be denied if any violation of any provision of the entire city code was found. *See id.* at 675. The licensing ordinance did not specify which ordinances were "applicable" and instead gave city officials broad discretion to determine which ordinances applied to a particular applicant. *See id.* Additionally, the licensing ordinance failed to specify the requisite procedural safeguards, providing no time limits within which the city commission was to decide whether an applicant would be granted a license. *See id.* at 675-76. Finally, the ordinance furnished no means for prompt judicial review of city commission decisions. *See id.*

In ruling that the ordinance was unconstitutional due to its broad grant of discretion to city officials unaccompanied by the appropriate procedural safeguards, the Court noted, however, that if the ordinance had specified the provisions with which an applicant must comply and had provided the requisite procedural safeguards, then the city official's discretion would likely be "satisfactorily curtailed." *See id.* at 674, n.4.

In this case, the transfer provisions of the AEC lack the constitutional infirmities contained in the Hallendale ordinance. Specifically, the licensing requirement delegates the determination of whether a property is in compliance with a code to the appropriate administrative departments, not to the city commission. The ordinance

also specifies the ordinances with which an applicant must comply. Unlike the ordinance in *Miami Herald*, the AEC requires the County departments to inspect for violations of applicable building, zoning, fire and health ordinances or codes relevant to such departments including criminal statutes and ordinances in the case of the Sheriff. See (AEC § 3-9). The ordinance does not give city officials uncontrolled discretion to deny a license based on violations of any part of the entire Orange County Code. Instead, the ordinance specifies which provisions are applicable.

Additionally, the ordinance provides the requisite procedural safeguards established in *FW\PBS v. City of Dallas*, 493 U.S. 215 (1990). Section 3-29 requires the Tax Collector to grant or deny a transfer license within thirty (30) days from the date of filing the application. The decision must be made within thirty days regardless of whether the appropriate departments have conducted their inspections. After thirty days, if none of the departments has made a finding that the application should be denied, the Tax Collector must grant the license transfer. *See* (AEC § 3-29(b)). This provision provides a satisfactory procedural safeguard as required by *City of Dallas*. *See Redner v. Dean*, 29 F.3d 1495, 1500 (11th Cir. 1994) (finding that time limitations that require a decision within 45 days are reasonable). The AEC also provides for prompt judicial review (AEC § 3-10), and as previously noted, Clayton concedes that the Court is bound by the Eleventh Circuit Court of Appeals' decision in *Boss Capital* upholding a judicial review provision like the one contained in the AEC.

Clayton additionally argues that the thirty day time limitation is illusory because the Tax Collector may deny

an application based on any minor code violation, and therefore an applicant is forced to reapply and begin the process all over again. Clayton claims that its previous applications have taken much longer than thirty days for determination when considered together because it has been forced to reapply several times due to various code infractions. According to Clayton, the licensing scheme allows the County to prolong the process indefinitely by finding code violations and denying an application which then forces an applicant to successively reapply for a transfer license.

The Court's task, however, is to analyze the AEC transfer provision as it is written and not as the County could hypothetically enforce it. In a facial challenge, the facts of the challenging party's case are irrelevant.[5] *See Miami Herald*, 734 F.2d at 674. Accordingly the Court finds that the AEC's license transfer procedure does not grant unfettered discretion to County officials and provides adequate procedural safeguards to pass muster under the First Amendment.

Based on the foregoing the Court **RULES** as follows:

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[5] The facts of the record show that although Clayton's application was initially denied, Clayton reapplied and corrected the code violations discovered in the inspection conducted during the reapplication process. The County did not deny Clayton's application immediately upon finding a code violation and instead allowed Clayton to correct the violations during the thirty day time period. After Clayton made the corrections, the County granted the license transfer during the thirty day time period. Thus, the ordinance operated to provide Clayton with a decision within a reasonable period of time.

1) Plaintiff Clayton Hospitality Group, Inc.'s Motion for Summary Judgment (Doc. No. 28) is **DENIED**.

2) Defendants Orange County and Earl K. Wood's Motion for Summary Judgment (Doc. No. 40) is **GRANTED**.

3) The Clerk is directed to enter judgment in favor of the Defendants Orange County and Earl K. Wood and against Clayton Hospitality Group, Inc. And to **CLOSE THIS CASE**.

**DONE AND ORDERED** at Orlando, Florida, this 30th day of July, 2002.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**
**Case No. 6:01-CV-1271-ORL-19JGG**

**CLAYTON HOSPITALITY GROUP, INC.,**

**Plaintiff,**

**vs.**

**ORANGE COUNTY, a political subdivision of the State of Florida and EARL K. WOOD, in his official capacity as Orange County Tax Collector,**

**Defendants.**

**ORDER**

This case was considered by the Court on the following matters:

1) Plaintiff Clayton Hospitality's Motion for rehearing of Order (Doc. No. 52, filed August 13, 2002); Defendants Orange County and Earl K. Wood's Response in Opposition to Plaintiff's Motion for Rehearing (Doc. No. 53, filed August 23, 2002); and Notice of incorrect Designation (Doc. No. 55, filed August 27, 2002).

The Court previously entered summary judgment in favor of the Defendant [sic] on July 30, 2002. The Plaintiff has moved pursuant to Federal Rule of Civil Procedure 59(e) to alter or amend the judgment. Plaintiff requests that the Court amend its previous Order to reflect

that the violations which the inspectors noted at the property were actually alleged violations. Clayton disputes that the alleged violations actually violated the building code. Additionally, Clayton maintains that the Court's grant of summary judgment to the Defendant [sic] did not depend on a factual finding that the violations actually existed. Instead, the Court found the County's ordinance facially valid, and thus the factual circumstances of the case are irrelevant.

The Court did not resolve any issues of disputed fact in its Order as to whether alleged violations of the building code were violations in fact. Instead the order recites a factual history of events which led the parties to this Court. Disputes between the parties as to whether alleged violations of the building code did or did not exist do not affect the analysis of the facial challenge made by plaintiff to the Adult Entertainment Code license transfer provision, and no ruling on such disputes was made. *See* page 16 of the Order at Docket No. 48.

To the extent this clarification is needed, Plaintiff Clayton Hospitality's Motion for Rehearing of Order (Doc. No. 52) and Notice of incorrect Designation (Doc. No. 55) are **GRANTED.**

**DONE AND ORDERED** at Orlando, Florida this 3rd day of September, 2002.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:

All counsel of Record

[The following are the sections of the Orange County Adult Entertainment Code that are pertinent to this Petition.]

**Section 3-10. Review of decisions by tax collector.**

Any decision of the tax collector pursuant to article II of this chapter to grant or deny a license, or any failure of the tax collector to render a decision in accordance with the outermost time requirements of article II of this chapter, may be immediately reviewed as a matter of right by a court of competent jurisdiction upon the filing of an appropriate pleading by an aggrieved party.

**Section 3-26. Required; classifications.**

(a) **Requirement.** No adult entertainment establishment shall be permitted to operate without having been first granted an adult entertainment license by the tax collector under this chapter . . .

**Section 3-33. Transfer.**

(a) **Requirements.** A licensee under this article shall not partially or fully transfer his license to another person, and thereby partially or fully surrender possession, control, and operation of the licensed establishment to such other person, unless and until such other person satisfies the following requirements:

(1) Obtains a transferred license from the tax collector which provides that the applicant is now the licensee, which transferred license may

> be obtained only if the applicant has completed and properly filed an application pursuant to Section 3-27, the application has been investigated under Section 3-28, and the application has been granted by the tax collector pursuant to Section 3-29 . . .

**Section 3-127. Operation of establishment without valid adult entertainment license.** It shall be unlawful for any person to be an operator of an adult entertainment establishment where the person knows or should know:

(1) That the establishment does not have an adult entertainment license for any applicable classification;
(2) That the establishment has a license which is under suspension;
(3) That the establishment has a license which has been revoked or cancelled; or
(4) That the establishment has a license which has expired.

No. 03-201

Supreme Court, U.S.
FILED
SEP 8 _ 2003
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

CLAYTON HOSPITALITY GROUP, INC.,

*Petitioner,*

v.

ORANGE COUNTY, a political subdivision of the STATE OF FLORIDA, and EARL K. WOOD, in his official capacity as Orange County Tax Collector,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether Clayton Hospitality Group, Inc., has abandoned the constitutional challenge based upon prompt judicial review because it was not specifically raised in the *Amended Complaint* and, contrary to Clayton Hospitality's references to a *First Amended Complaint*, there was no such document in the record before the District Court?

2. Alternatively, in the event the issue was properly preserved, whether the Eleventh Circuit properly upheld the facial constitutionality of the license transfer provision in *Orange County's Adult Entertainment Code* (AEC) because the AEC assures prompt judicial review by allowing access to prompt judicial review?

## PARTIES TO THE PROCEEDING

As listed by Petitioner, Clayton Hospitality Group, Inc., d/b/a Diamond Club, the Respondents are Orange County, a political subdivision of the State of Florida, and Earl K. Wood, in his official capacity as Orange County Tax Collector. Orange County and the Orange County Tax Collector are separate and distinct governmental entities.

## RULE 29.6 STATEMENT

Orange County, a political subdivision of the State of Florida, and Earl K. Wood, in his official capacity as Orange County Tax Collector, are governmental entities.

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## STATEMENT OF THE CASE

Orange County ("County") and Earl K. Wood, as Orange County Tax Collector ("Tax Collector"), hereinafter jointly referred to as Respondents, incorporate by reference the procedural background and statement of the facts in the opinion of the Eleventh Circuit. (Pet. App. 2a to 8a)

The following misstatements of facts in the Petition are addressed below.

Respondents disagree with the statement on page vii of the Petition limiting the pertinent sections of the *Orange County Adult Entertainment Code* to only four sections. The courts below reviewed Chapter 3 of the *Orange County Code*, known as the *Orange County Adult Entertainment Code* ("AEC"), in its entirety. In fact, the orders entered below referenced Sections 3-9, 3-10, 3-19, 3-26, 3-27, 3-28, and 3-33 of the AEC. Further, the *Orange County Code* contains a general severability clause, codified in Section 1-11, that could be employed to sever any unconstitutional portion of the AEC, if appropriate.

The license transfer provisions of the AEC were the subject of this facial challenge. Clayton Hospitality Group, Inc. d/b/a "Diamond Club" ("Clayton Hospitality") attempts to summarize the procedure under the AEC for processing applications for the transfer of existing adult entertainment licenses. (Pet. 1) Clayton Hospitality's loosely-worded summary is inaccurate in that it does not precisely reiterate the applicable provisions of the AEC. For example, Clayton Hospitality asserts that each of the departments reviewing a license transfer application make a "*recommendation* to the Tax Collector." (Pet. 1) Actually, Section 3-28(c) of the AEC states that "[a]t the conclusion of its investigation, each department shall prepare a *report or memorandum*

and forward such report or memorandum to the tax collector. . . . "

Further, Respondents disagree with the statement by Clayton Hospitality that the Tax Collector does whatever the departments "recommend" without exception. (Pet. 1, n.2). As stated in Section 3-29(b) of the AEC, if the Tax Collector does not receive a report from a reviewing department within the 30-day period after the filing of an application, the Tax Collector is required to grant the application if no adverse findings from any of the other reviewing departments were reported within those 30 days.

Clayton Hospitality claims that "the applicant has 30 days to file a petition for review in the circuit court of Orange County." (Pet. 2) The AEC does not limit the aggrieved party to a petition for review in the state circuit court, but allows the aggrieved party to file an appropriate pleading, including a complaint for injunctive or declaratory relief, in *any* court of competent jurisdiction. Section 3-10 of the AEC provides that "[a]ny decision of the tax collector . . . may be immediately reviewed as a matter of right by a court of competent jurisdiction upon the filing of an appropriate pleading by an aggrieved party." (Pet. App. 27a)

Clayton Hospitality makes a legal argument regarding the jurisdiction of the circuit courts. (Pet. 2, n.3) Respondents disagree with the inference that decisions of the Tax Collector related to applications for a transfer of an adult entertainment license must be reviewed in the same manner as quasi-judicial decisions of administrative agencies. Such decisions are quasi-executive decisions, not quasi-judicial decisions.

Clayton Hospitality claims that there is no time limit within which the circuit court must render a decision. (Pet. 2) The Federal Rules of Civil Procedure "govern the procedure in the United States district courts in all suits of a civil nature" and "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1 (2003). *See also*, Fla. R. Civ. P. 1.010 (2003). To effectuate the speedy determination of an action, the Rules of Civil Procedure provide a method for seeking a preliminary injunction (Fed. R. Civ. P. 65), a process for the prompt preparation of a case management report (Local Rule 3.05), and the entry of a Case Management Order with a trial date (Local Rule 3.05). In other words, the time frame within which a court must render a decision is governed in part by the Case Management Report prepared by the parties.

Respondents take issue with the claim that Clayton Hospitality vigorously disputed the violations. The undisputed facts show otherwise. According to the undisputed facts, on August 7, 2001, Gerald Uranick, the President of Clayton Hospitality, filed an application on behalf of Clayton Hospitality with the Occupational License Department of the Orange County Tax Collector for a transfer of the adult entertainment license for the Diamond Club from the existing license holder, InnCon America, Inc.

In accordance with Section 3-28(a) of the AEC, the Occupational License Department promptly sent copies of the transfer application to the several reviewing departments, those being the Orange County Sheriff, the building division, the fire and rescue services department, the health department, and the zoning division. Within 30 days of the filing of the transfer application, the zoning

division, the fire and rescue services department, and the sheriff reported to the Occupational License Department that they had not found any violations or other information that would require the denial of the application for a transfer of the Diamond Club adult entertainment license. (The health department did not submit a report.)

However, before the expiration of the same 30-day period, on August 22, 2001, after coordinating a date and time for the inspection with the owner or applicant, building division inspectors conducted an inspection of the Diamond Club and found several violations of the building code. During the inspection, the inspectors gave notice of building, electrical, and plumbing violations as specified in the Inspection Notices. The code violations included faulty stairway construction inside the establishment, and exterior lighting in damp locations, which lighting was not marked for use in wet locations. An excerpt from the building code detailing the requirements for stairway construction was delivered by the building division along with the Inspection Notices to Mr. Uranick by facsimile on August 30, 2001. By letter dated September 6, 2001, the Tax Collector, by and through the Occupational License Department, therefore notified Mr. Uranick of the denial of his application for a transfer of the adult entertainment license for the Diamond Club.

On October 30, 2001, the then current holder of the Diamond Club adult entertainment license, InnCon America, Inc., filed an application for a *renewal* of the existing adult entertainment license pursuant to Section 3-30(c) of the AEC. According to InnCon's application, Mr. Uranick had the "right or authority to manage or control the day-to-day operation of the establishment." That same day, October 30, 2001, the Tax Collector, by and through

the Occupational License Department, approved InnCon's application and renewed InnCon's adult entertainment license.

On or about October 30, 2001, Clayton Hospitality filed a Complaint against Orange County and Earl K. Wood, as Orange County Tax Collector.

Also on October 30, 2001, pursuant to Section 3-29(d) of the AEC, Clayton Hospitality filed a *second* application for a transfer of the existing adult entertainment license for the Diamond Club. Included with Clayton Hospitality's second application was a revised floor plan dated October 25, 2001. This revised floor plan had been modified from the floor plan that was filed with the initial transfer application to show a pool table and vending machines, thereby reducing the open floor space.

After coordinating with the applicant, the building division conducted another inspection on November 8, 2001. The building division determined, based upon its review of the revised floor plan and inspection, that the occupant load for the establishment would be under 100 and, therefore, the stairs that had previously been found in violation due to the Group A assembly nature of the Diamond Club now complied with Section 1019.9 of the *Standard Building Code* pertaining to stairway construction. However, the inspectors noted that the violation of *National Electrical Code*, Section 410-4(6), which requires exterior lighting fixtures in wet locations to be marked "Suitable for Wet Locations," still existed. The building division noted a second violation due to a raised floor area which appeared to have been constructed without a building permit.

This time, after receiving the inspection notices, Clayton Hospitality addressed the building code violations within the 30-day period that began on the date Clayton Hospitality had filed the second transfer application. Because the violations were resolved within the 30-day period, the building division notified the Occupational License Department prior to the expiration of the 30-day period that the applicant had corrected the building code violations. Accordingly, by letter dated November 28, 2001, the Tax Collector, by and through the Occupational License Department, *granted* the second application for a transfer of the existing adult entertainment license to Plaintiff.

Nevertheless, on January 29, 2002, Clayton Hospitality filed an Amended Complaint. In its Amended Complaint, it dropped the "as applied" challenge and dropped the specific argument that the AEC did not provide for prompt judicial review.

Clayton Hospitality claims that it properly asserted or reserved the prompt judicial review argument below. However, Respondents object to the inclusion of the prompt judicial review issue because the issue was not included in the Amended Complaint served on the County or the Tax Collector, and, based upon Respondents' records, Clayton Hospitality never filed a *First* Amended Complaint with the District Court below where the issue was "raised." In fact, the Eleventh Circuit stated that "[a] review of the record has not revealed a document labeled 'First Amended Complaint.'" (Pet. App. 9a) The *First* Amended Complaint that Clayton Hospitality referred to in its Initial Brief and filed in its Record Excerpt to the Eleventh Circuit is a different document from the Amended Complaint filed with the District Court. The

Amended Complaint contains forty-three (43) paragraphs and three (3) counts, whereas the *First* Amended Complaint contains forty-five (45) paragraphs and two (2) counts.

Respondents also vehemently disagree with Clayton Hospitality's claim regarding a so-called pattern of granting applications. (Pet. 2, n.5). The Eleventh Circuit held, "The Court's task, however, is to analyze the AEC transfer provision as it is written and not as the County could hypothetically enforce it. In a facial challenge, the facts of the challenging party's case are irrelevant." (Pet. App. 23a) Accordingly, such a claim by Clayton Hospitality is not only wrong, but should be disregarded.

Contrary to Clayton Hospitality's claim that the case was "dismissed," both the Eleventh Circuit and the District Court ruled in favor of the County and the Tax Collector and upheld the constitutionality of the license transfer provisions of the AEC.

Lastly, Clayton Hospitality claims that the Eleventh Circuit held below that "prompt access to the courts was sufficient to comply with *Freedman* [*v. Maryland*, 380 U.S. 51 (1965)]." (Pet. 3) Because the Eleventh Circuit recognized that the record did not reveal the version of the Complaint relied upon by Clayton Hospitality in its Initial Brief below, the Eleventh Circuit's brief reference to its *Boss Capital* decision in a footnote was dicta and fell short of an adjudication on the merits regarding the prompt judicial review issue. The Eleventh Circuit stated in that footnote:

> . . . . A review of the record has not revealed a document labeled "First Amended Complaint." Nevertheless, we have determined that "access to

> prompt judicial review [as opposed to prompt judicial resolution] is sufficient for adult entertainment licensing ordinances." *See Boss Capital, Inc. v. City of Casselberry*, 187 F. 3d 1251, 1256-57 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1423 (2000).

Pet. App. 9a, n.3. Further, the Eleventh Circuit never cited to *Freedman v. Maryland*, 380 U.S. 51 (1965).

## REASONS FOR DENYING THE WRIT

### The Issue of "Prompt Judicial Review" was not Properly Preserved

The Amended Complaint served on the County and the Tax Collector did not specifically raise or preserve a constitutional challenge based upon the "prompt judicial review" issue. The Eleventh Circuit Court of Appeals specifically pointed out that the pleading relied upon by Clayton Hospitality, the *First* Amended Complaint, was not part of the record. Accordingly, as Respondents argued below, Clayton Hospitality should not be allowed to cure or attempt to cure deficient pleadings by filing amended pleadings with the Eleventh Circuit.

### The AEC Assures "Prompt Judicial Review"

Section 3-10 of the AEC provides that "[a]ny decision of the tax collector . . . may be immediately reviewed as a matter of right by a court of competent jurisdiction upon the filing of an appropriate pleading by an aggrieved party." (Pet. App. 27a) Clayton Hospitality expressly conceded below that, under controlling case law for the Eleventh Circuit, the AEC assures prompt judicial review.

The Eleventh Circuit held in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256-57 (11th Cir. 1999) that "[w]e agree with the First, Fifth and Seventh Circuits and hold that prompt judicial review is sufficient for adult entertainment licensing ordinances." The judicial review provision in the Casselberry ordinance is similar to the AEC in that it allows any decision to be "immediately reviewed as a matter of right by the circuit court upon the filing of an appropriate pleading by an aggrieved party." *Id.* at 1259.

The cases relied upon by Clayton Hospitality are distinguishable. First, the issue here involves the provisions relating to the transfer of an existing adult entertainment license. In the instant case, the Diamond Club was open and operational before and throughout the subject litigation, and the record shows that Mr. Uranick, the President of Clayton Hospitality, had the right or authority to manage or control the day-to-day operation of the business, even before the license transfer application was approved.

Second, Section 3-10 of the AEC does not limit the review process to a particular pleading or forum. The applicant may file a complaint for injunctive and declaratory relief and may even immediately move for a preliminary injunction, as did Clayton Hospitality here. In summary, under Section 3-10 of the AEC, the aggrieved party has the right to decide what type of pleading(s) to file and what court to file the pleading(s) with. Section 3-10 does not limit his options in any way.

Other ordinances restrict the method of judicial review to a petition for writ of mandamus or a petition for writ of certiorari, and do not allow the aggrieved party to

file a complaint for injunctive relief. For example, the ordinance reviewed by the Ninth Circuit in *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998), required review through a petition for a writ of mandamus. Similarly, the Memphis Ordinance reviewed by the Sixth Circuit in *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 223 (6th Cir. 1995), provided for the appeal of adverse decisions by common law writ of certiorari. *See also, 11126 Baltimore Blvd. v. Prince George's County, Maryland*, 58 F.3d 988, 992 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 567 (1995) (although the code did not contain a provision for judicial review, Maryland law provided for judicial review of final administrative decisions).

Review through a petition for writ of mandamus or a petition for writ of certiorari is inherently different from a trial based upon a complaint for injunctive relief or a hearing on a motion for preliminary injunction. Respondents submit that the ordinances under review may be the root of the differences among the circuits.

Still other ordinances contained other constitutional defects. For example, the Littleton Ordinance reviewed in *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002), had multiple problems including the failure to require a decision within a brief specified time frame. Unlike Littleton's licensing scheme, the AEC requires a decision within a brief specified time frame.

Nevertheless, Respondents submit that unlike the review required for censorship decisions under *Freedman*, "access to prompt judicial review is sufficient for licensing decisions." *Boss Capital*, 187 F.3d at 1256. As reasoned by the Eleventh Circuit in *Boss Capital*, citing *FW/PBS, Inc.*

*v. City of Dallas*, 110 S. Ct. 596 (1990), "[t]he dangers of censorship are less threatening when it comes to licensing schemes. Unlike censors, who pass judgment on the *content* of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license." *Id.* Therefore, the Eleventh Circuit held "[t]he need for a prompt judicial decision is therefore less compelling for licensing ordinances than for censorship schemes." *Id.* Hence, Respondents submit that the position of several of the Circuit Courts of Appeals, including the Eleventh Circuit, that "prompt judicial review" under the *FW/PBS* decision means prompt judicial *access*, not prompt judicial *resolution*, is the correct interpretation.

Furthermore, while local governments can certainly incorporate provisions into their adult entertainment ordinances assuring prompt judicial access, they cannot include provisions guaranteeing prompt judicial resolution. Only the reviewing court can ensure a prompt judicial resolution of a dispute.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 03-201

# In the Supreme Court of the United States

**CLAYTON HOSPITALITY GROUP, INC.,**
***Petitioner,***

***vs.***

**ORANGE COUNTY, FLORIDA and EARL K. WOOD,**
***Respondents.***

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## ARGUMENT

Orange County and Earl K. Wood tell this Court in their Brief in Opposition that (1) the issue of prompt judicial review was not presented to the courts below,[1] and (2) that the courts below correctly resolved the issue.[2] As to the latter claim, that is more properly presented to this Court if the Petition is granted and the parties argue the merits of the case. Therefore, Clayton Hospitality Group, Inc. will not burden the Court with an unnecessary response to an argument on the merits, but will save that argument for the appropriate time.

Clayton will reply to the argument of the Respondents that the issue was abandoned in the trial court. As the Respondents well know, that issue was specifically raised in the trial court, was ruled on by the trial court and was ruled on by the Court of Appeals. It is properly before this Court.

## REASON FOR GRANTING THE WRIT

When Clayton Hospitality Group, Inc. filed its initial Complaint in the United States District Court for the Middle District of Florida, it included a claim that the license transfer provision of the Orange County Adult Entertainment Ordinance failed to comply with the requirements of *Freedman v. Maryland*, 380 U.S. 51 (1965). Specifically, Clayton argued that the provision did not provide prompt judicial review if a license transfer was denied. In ¶ 25 of the Complaint, Clayton said:

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[1] Question 1, Respondents' Brief in Opposition.

[2] Question 2.

25. The license transfer provisions of the Code are facially unconstitutional under the First Amendment to the United States Constitution:

a. There is not a specified, brief period of time within which the transfer must take place. The time limits in the ordinance are illusory, in that endless delay can result from a finding that the building is allegedly in violation of some provision of some statute, ordinance, rule, regulation or court order;

b. The ordinance is a grant of unbridled discretion to County officials and employees to deny an applicant a license by interminable delay, unnecessary inspections and questionable property improvements and modifications; and

c. There is no provision for prompt judicial review of a transfer denial. The only remedy for a wrongful rejection is a lengthy suit in state court, with no requirement of a prompt judicial decision.

After some discovery, the parties filed motions for summary judgment. In its motion, Clayton presented its

"prompt judicial review" claim. However, in footnote 23 of its motion, Clayton pointed out to the District Court that the issue was being presented to preserve it for appellate review, since the District Court could not rule in Clayton's favor on that issue:

> For purposes of preserving an issue for further review, Clayton also argues that the ordinance fails to provide for prompt judicial review when a transfer application is denied. *See* ¶ 32(3) of the Amended Complaint. Clayton readily acknowledges that this Court must rule against Clayton on this issue. *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 529 U.S. 1021, 120 S.Ct. 1423 (2000).

Subsequently, Clayton filed its Amended Complaint, and inadvertently omitted the claim that the transfer provision failed to provide for prompt judicial review. That omission was pointed out to Clayton's counsel by defense counsel at the required meeting to prepare the parties' Joint Pretrial Statement. Clayton acknowledged the inadvertent error, and advised defense counsel that another amended complaint would be filed adding only the accidently omitted claim. Clayton asked if the defendants would consent to that amendment, and defense counsel promised to respond to that request.

The parties filed the Joint Pretrial Statement. In it, Clayton informed the District Court that the issue of prompt judicial review was being presented to preserve it for later appellate review:

> As Clayton noted in its Complaint, the argument about prompt judicial review, a requirement of *Freedman v. Maryland*, is included in this action simply to preserve it for further review. This Court is foreclosed from deciding this issue in Clayton's favor by the ruling of the Eleventh Circuit in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999). Regardless of the outcome of this case, Clayton intends to present this claim for possible further review.
>
> However, attorneys for the County pointed out to Clayton's counsel, at the Joint Pretrial Statement meeting on May 6th, that the Amended Complaint did not include a challenge concerning judicial review. That omission was inadvertent. Clayton will seek to amend its Complaint to add the judicial review challenge.[3]

The Respondents argued to the trial court that the ordinance did provide prompt judicial review:

> As required by *FW/PBS*, the licensing authority must give an answer within a brief, specified time period. Accordingly, the transfer provision is clearly constitutional because the AEC provides for a prompt decision pursuant

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[3] Joint Pretrial Statement, p. 9, fn. 9.

> to section 3-29(a)(1) and prompt judicial review pursuant to section 3-10. *See, Redner* v. *Dean,* 29 F.3d 1494 (11th Cir. 1994), *cert. denied.,* 514 U.S. 1066 (1995) (stating that a 45-day time limit on the administrator's decision to grant or deny the license was reasonable); *Boss Capital. Inc. v. City of Casselberry,* 187 F.3d 1251 (11th Cir. 1999) (holding that "access to prompt judicial review is sufficient for adult entertainment licensing ordinances").[4]

However, before the defendants replied to the request by Clayton to correct the inadvertent omission, the District Court issued its ruling on the motions for summary judgment.[5] The District Court recognized that the issue was before it only for purpose of preserving it for future review, and expressly ruled on the issue:

> Clayton asserts that the AEC provision at issue fails both requirements of a specific time frame and prompt judicial review. However, Clayton concedes that his argument that the ordinance fails to provide prompt judicial review is not supported by the Eleventh Circuit Court of Appeals' decision in *Boss Capital, Inc. v. City of Casselberry*, 187

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[4] *Id.*, p. 11.

[5] The District Court had the Joint Pretrial Statement before it when it issued its ruling on the motions for summary judgment.

> F.3d 1251 (11th Cir. 1999). In *Boss Capital* the Eleventh Circuit Court of Appeals found that access to prompt judicial *review,* as opposed to judicial *resolution,* is sufficient for adult entertainment licensing ordinances. *See Boss Capital*, 187 F.3d at 1256-57. The Court agrees that under *Boss Capital*, the AEC sufficiently provides for prompt judicial review of the Tax Collector's decision. *See* (AEC § 3-10). Clayton concedes this as well, but makes his argument for the purpose of preserving it for appeal.
>
> Appendix to Petition, at 19a-20a.

The case went to the United States Court of Appeals for the Eleventh Circuit. That court also acknowledged that the point had been preserved for appellate review, and like the District Court, expressly ruled on the issue:[6]

> Clayton also argues for purposes of preserving the record, that the license-transfer provisions in the AEC are unconstitutional because they do not require courts to grant prompt judicial review. Defendants respond that, despite that the record excerpts contain a document labeled "First Amended Complaint," which includes this argument, the record only contains a document entitled "Amended

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[6] App. A to the Petition, at 9a, fn. 3.

> Complaint," in which Clayton abandoned this argument A review of the record has not revealed a document labeled "First Amended Complaint." Nevertheless, we have determined that "access to prompt judicial review [as opposed to prompt judicial resolution] is sufficient for adult entertainment licensing ordinances." *See Boss Capital, Inc. v. City of Casselberry*. 187 F.3d 1251, 1256-57 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000).

Respondents claim that the brevity of the treatment given to the prompt judicial review issue by the Eleventh Circuit indicated that it was not a ruling on the merits.[7] However, as Clayton conceded in both courts below, as the District Court said and as the Eleventh Circuit repeated, there was binding precedent in the circuit, in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1257 (1999), *cert. denied*, 529 U.S. 1020 (2000), and no lengthy discussion was necessary. The Circuit Court said all that was necessary to recognize that Clayton *had* presented the issue, and that *Boss Capital* compelled the panel to reject the claim.

## CONCLUSION

The District Court and the Eleventh Circuit, relying on the Circuit's prior precedent in *Boss Capital, Inc.*, expressly held that the license transfer provision of the Orange County Adult Entertainment Code provided for prompt judicial review. The decision of the Eleventh

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[7] Brief in Opposition, at 7.

Circuit panel reaffirms that the Eleventh Circuit is in direct conflict with at least two, and as many as four, other federal circuits on the issue. Without question, the decision is squarely in conflict with the decision in *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 311 F.3d 1220 (10th Cir. 2002). That case is now pending in this Court.[8]

The Respondents never argue that there is not a conflict among the circuits, nor could they. The Court is well aware of the conflict, which it recognized in *City News & Novelty, Inc. v. City of Waukesha*, 121 U.S. 743 (2001) and *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). Clayton asks the Court to either grant the Petition for Writ of Certiorari so the conflict can be resolved, or hold this case in abeyance until the Court rules on the pending petition in *Littleton*.

Respectfully submitted,

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[8] Docket No. 02-1649.